

STATE OF VERMONT  
PUBLIC SERVICE BOARD

Docket No. 7619

Petition of National Mobile Communications       )  
Corp., d/b/a Sovernet Communications, for       )  
designation as an Eligible Telecommunications       )  
Carrier in areas served by non-rural telephone       )  
companies under the Telecommunications Act of       )  
1996       )

Order entered: 7/8/2010

**ORDER RE MOTIONS TO INTERVENE**

On June 22, 2010, the eight independent Vermont incumbent local exchange carriers (the "Independents"),<sup>1</sup> filed a motion for permissive intervention in this proceeding.<sup>2</sup> Similarly, on June 23, 2010, Telephone Operating Company of Vermont, LLC, d/b/a FairPoint Communications ("FairPoint"), filed a motion for intervention as of right under PSB Rule 2.209(A), or in the alternative, for permissive intervention under PSB Rule 2.209(B). On June 30, 2010, National Mobile Communications Corp., d/b/a Sovernet Communications ("Sovernet"), filed a memorandum in opposition to both the Independents' and FairPoint's motions to intervene. For the reasons set forth below, I grant both the Independents and FairPoint intervention on a permissive basis pursuant to PSB Rule 2.209(B).

---

1. The Independents are: Franklin Telephone Company; Ludlow Telephone Company; Northfield Telephone Company; Perkinsville Telephone Company; Shoreham Telephone Company; Topsham Telephone Company, Inc.; Waitsfield-Fayston Telephone Company, Inc., d/b/a Waitsfield Telecom, d/b/a Champlain Valley Telecom; and Vermont Telephone Company, Inc., d/b/a VTel.

2. The Independents' motion does not specify whether they seek intervention as of right pursuant to PSB Rule 2.209(A), or on a permissive basis pursuant to PSB Rule 2.209(B). However, the motion asserts that intervention by the Independents "will not unduly delay the proceeding or prejudice the interests of existing parties or of the public." Motion at 4. Because the undue delay standard is unique to PSB Rule 2.209(B), I am treating the motion as one for permissive intervention under that section.

Intervention in Public Service Board ("Board") proceedings is governed by PSB Rule 2.209, which establishes requirements for both intervention as of right and permissive intervention, and provides as follows:

(A) Intervention as of right. Upon timely application, a person shall be permitted to intervene in any proceeding (1) when a statute confers an unconditional right to intervene; (2) when a statute confers a conditional right to intervene and the condition or conditions are satisfied; or (3) when the applicant demonstrates a substantial interest which may be adversely affected by the outcome of the proceeding, where the proceeding affords the exclusive means by which the applicant can protect that interest and where the applicant's interest is not adequately represented by existing parties.

(B) Permissive intervention. Upon timely application, a person may, in the discretion of the Board, be permitted to intervene in any proceeding when the applicant demonstrates a substantial interest which may be affected by the outcome of the proceeding. In exercising its discretion in this paragraph, the Board shall consider (1) whether the applicant's interest will be adequately protected by other parties; (2) whether alternative means exist by which the applicant's interest can be protected; and (3) whether intervention will unduly delay the proceeding or prejudice the interests of existing parties or of the public.<sup>3</sup>

### **The Independents' Motion**

The Independents assert that Eligible Telecommunications Carrier ("ETC") designations must be "consistent with the public interest, convenience, and necessity" and that they have a "legal interest in ensuring the Board applies fair and consistent standards when determining the public interest, convenience and necessity of designating carriers as ETCs in Vermont."<sup>4</sup> The Independents further assert that they have an interest in the overall sustainability of the federal universal service fund, and that the Board's decision in this matter will "affect the legal duties, rights and interests of the Independents."<sup>5</sup>

---

3. PSB Rule 2.209.

4. Independents Motion at 2 (quoting 47 U.S.C. § 214(e)(2)) and 3.

5. Independents Motion at 3-4.

Sovernet contends that the Independents have failed to establish an interest in the proceeding sufficient to warrant intervention because Sovernet is not seeking ETC status in the service areas served by the Independents. As a result, Sovernet concludes that "there is absolutely nothing" in the Independents' motion that supports intervention.<sup>6</sup> Sovernet further contends that the Department of Public Service ("DPS" or "Department") and the Board are expert bodies with respect to determinations of the public interest, convenience and necessity, rendering the Independents' participation in the Docket unnecessary.<sup>7</sup> Sovernet also argues that the interim cap placed on high cost support received by competitive ETCs renders the Independents' concerns about fund sustainability without merit, and that even if the cap were lifted, the amount of support received annually by Sovernet would be too small to have any impact on the long-term health of the fund.<sup>8</sup> Lastly, Sovernet argues that the Independents provide no support for their claim that the results of this proceeding will affect their legal duties, rights and interests, and that granting the Independents intervention will unduly delay the proceeding and prejudice Sovernet's interests.<sup>9</sup>

I conclude that the Independents have demonstrated an interest sufficient to warrant intervention in this proceeding, even though Sovernet is not seeking ETC designation in the service territories of the Independents. First, Sovernet is a potential competitor to the Independents. While Sovernet may not be seeking ETC designation in the Independent service territories, there is nothing in Vermont law that prohibits Sovernet from offering service in those same territories. As ETCs the Independents are subject to a number of Board imposed-requirements,<sup>10</sup> and have an interest in seeking regulatory parity with their competitors. Second,

---

6. Sovernet Memorandum at 2.

7. Sovernet Memorandum at 3.

8. Sovernet Memorandum at 3-6.

9. Sovernet Memorandum at 6-7, 9-10.

10. See, e.g. *Investigation into State Certification of Compliance by Nine Rural Telephone Companies with Subsection 254(e) of the Telecommunications Act of 1996*, Docket 6530, Amended Order of 1/16/02 (imposing reporting requirements on the Independents).

as ETCs, the Independents may find themselves subject to the same obligations imposed on competitive ETCs in their Vermont designation proceedings.<sup>11</sup> Accordingly, the outcome of this proceeding may indeed affect the legal rights, duties and interests of the Independents.

Additionally, Sovernet's claim that the Independents' participation in this Docket is somehow superfluous because the Department and Board are expert bodies when it comes to making determinations regarding the public interest is misplaced. If Sovernet were correct, then participation by any parties other than petitioners and the Department would be rendered meaningless in Board proceedings where the ultimate legal question is whether or not granting a petition would be in the public interest. Such an outcome is clearly unsupportable based on Board precedent, nor does it find any support in PSB Rule 2.209.<sup>12</sup> Determinations of consistency with the public interest are made based on facts and expert opinion proffered as evidence in Board proceedings, and entities such as the Independents likely have relevant information and insights for the Board's consideration in this Docket. Accordingly, I reject this argument.

Lastly,<sup>13</sup> I also conclude that Sovernet's argument that participation by the Independents will unduly delay the proceeding and prejudice Sovernet's interests is without merit. First, representatives of Sovernet, the Independents, FairPoint and the Department negotiated a proposed schedule for the proceeding, which was subsequently adopted.<sup>14</sup> It is difficult to see

---

11. The FCC has urged state commissions to adopt an approach of competitive neutrality in ETC designations, encouraging state commissions to amend designation requirements for ILECs (Incumbent Local Exchange Carriers) on a going-forward basis to be consistent with any requirements imposed on competitive carriers seeking ETC designation. *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order (FCC 05-46, rel. Mar. 17, 2005) at ¶ 58.

12. Under Rule 2.209, what is relevant is whether the potential intervenor has demonstrated an interest that is not adequately represented by existing parties, rather than whether the Department and Board are capable of exercising their duties without the participation of potential intervenors.

13. Because I have determined that the Independents demonstrated an interest sufficient to support permissive intervention by virtue of their status as ETCs and potential competitors of Sovernet, I do not address the arguments raised by either party regarding the long-term sustainability of the federal universal service fund for purposes of the pending motion. This does not preclude parties from addressing this issue in testimony.

14. See Docket 7619, Prehearing Conference Memorandum dated 6/4/10 at 2.

how the Independents' participation in this Docket pursuant to a schedule agreed to by Sovernet will unduly delay the proceeding or prejudice Sovernet's interests.<sup>15</sup> Sovernet also implies that a reconsideration request or appeal of a Board order by the Independents would somehow be prejudicial to Sovernet's interests.<sup>16</sup> Sovernet's argument is once again misplaced. The good-faith exercise of procedural rights provided to parties by law<sup>17</sup> cannot amount to undue delay or prejudice to Sovernet. Sovernet also fails to recognize that, with respect to appeals, Board orders are not automatically stayed.<sup>18</sup>

### **FairPoint's Motion**

FairPoint contends that it has a substantial interest in this proceeding due to: (1) Sovernet's stated intent to be designated an ETC in FairPoint's service territory; (2) Sovernet's reliance on FairPoint's UNE (Unbundled Network Elements) and resale offerings to meet its obligations under federal law; and, (3) its interest in insuring Sovernet meets all of its obligations under 47 U.S.C. § 214 (e)(2) and 47 C.F.R. § 54.201 so that customers in FairPoint's service area are not harmed.<sup>19</sup>

Sovernet argues that the fact that it seeks ETC designation in an area coextensive with FairPoint's service territory does not, in and of itself, establish a substantial interest on which FairPoint can rely to intervene in this proceeding. Sovernet also argues that its use of FairPoint's UNE and resale service offerings does not provide an adequate basis for FairPoint's

---

15. To the extent Sovernet is concerned that irrelevant issues will be raised during the proceeding, it has the ability to object to the admissibility of prefiled testimony and exhibits pursuant to PSB Rule 2.216(C) and to interpose appropriate objections during the technical hearing.

16. Sovernet Memorandum at 10.

17. *See, e.g.* V.R.C.P. 59 (New Trials; Amendment of Judgments), and 30 V.S.A. § 12 (Review by Supreme Court).

18. 30 V.S.A. § 12.

19. FairPoint Motion at 1-2.

intervention.<sup>20</sup> Lastly, Sovernet characterizes FairPoint's stated interest in insuring Sovernet meets all of its obligations under 47 U.S.C. § 214 (e)(2) and 47 C.F.R. § 54.201 so that customers in FairPoint's service area are not harmed, is a tacit suggestion by FairPoint that the Department and Board are not capable of performing their statutorily assigned duties.<sup>21</sup>

Sovernet's arguments are again misplaced. FairPoint has demonstrated a substantial interest in this proceeding because Sovernet is a direct competitor of FairPoint's, and utilizes FairPoint services to enable that competition. Before a direct competitor is allowed access to federal support monies that will enable it to better compete, FairPoint is appropriately interested in ensuring that such a competitor is meeting all of its obligations so that competition occurs on a level playing field. FairPoint's interest may even be heightened where it is required to actually provide, on a wholesale basis, the very services that Sovernet will use to compete against it. Sovernet's final argument appears to be little more than an attempt to characterize FairPoint's interest in a level playing field into an attempt by FairPoint to question the ability of the Department and Board to perform their statutory duties. While FairPoint's motion may have been more artfully drafted, I do not agree with Sovernet's attempted characterization and find no basis in Sovernet's argument to deny FairPoint intervention on a permissive basis.

For the foregoing reasons, the motions for intervention filed by the Independents and FairPoint are hereby granted on a permissive basis pursuant to PSB Rule 2.209(B).

**So ORDERED.**

---

20. Sovernet Memorandum at 7-8.

21. Sovernet Memorandum at 8.

Dated at Montpelier, Vermont, this 8th day of July, 2010.

s/ John J. Cotter  
John J. Cotter, Esq.  
Hearing Officer

OFFICE OF THE CLERK

FILED: July 8, 2010

ATTEST: s/ Susan M. Hudson  
Clerk of the Board

*NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)*